Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

G. A. WILLIS,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, also known as Burlington Northern Santa Fe,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Petitioner argued that an award of the National Railroad Adjustment Board ("NRAB") was not rendered promptly, to Petitioner's prejudice. Petitioner also claimed the NRAB award did not confirm that the Board's members were competent because the award was neither signed by the Board nor attested by its secretary. The questions presented are:

1. Whether the 1978 Supreme Court decision in *Union Pacific R.R. Co. v. Sheehan* precludes judicial review of a complaint that the NRAB did not issue a "prompt and orderly settlement" of a railroad labor dispute, or a competent award.

2. Whether a failure to render a prompt, timely award is a failure of the NRAB to comply with the requisites of the Railway Labor Act, and to conform itself to the matters within the scope of its jurisdiction.

3. Whether an award, which does not reflect that competent Board panel members actually participated in its rendition, evidences a failure to comply with the requisites of the Railway Labor Act, section 153(n).

PARTIES TO THE PROCEEDING

All parties are as listed in the caption. Respondent Burlington Northern and Santa Fe Railway Company was formerly known as Atchison, Topeka, and Santa Fe Railway Company, and was so named in the complaint.

RULE 29.6 STATEMENT

Respondent Burlington Northern and Santa Fe Railway Company is a subsidiary of Burlington Northern and Santa Fe Corporation, which has issued shares and debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

Gregory A. Willis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals panel (App., *infra*, 1a-2a) and of the district court (App., *infra*, 3a-27a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2000. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 45 U.S.C. §§ 151a(4) and (5), 153 First (q), and 153(n) of the Railway Labor Act. Section 151a of the Railway Labor Act provides that the intention and purpose of the Act is:

> (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
>
> (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application

> of agreements covering rates of pay, rules, or working conditions.

Section 153(q) provides:

> The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the divisions' jurisdiction, or for fraud or corruption by a member of the division making the order.

Section 153(n) provides:

> A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

STATEMENT

This case asks whether the requirement for prompt settlement of Railway Labor Act claims, by issuance of competent awards, is subject to judicial review. Petitioner Willis asserted that the failure of the NRAB to issue a prompt, timely award was a failure of the Board to comply with the requirements of the Act. Additionally, Willis asserted that because the NRAB's secretary did not attest the award, it did not reflect that the panel members

competent to make the award actually participated in its rendition. Accordingly, the Board did not comply with its rules and therefore did not confine itself to its jurisdiction. Both the district court and court of appeals held that Willis's claims did not present valid grounds for judicial review.

A. Statutory Background

In 1934, Congress created the National Railroad Adjustment Board. The NRAB is composed of an equal number of appointed union and employer representatives to sit at one of the Board's four divisions. The Railway Labor Act also authorized the appointment of a neutral referee with authority to decide any controversy presented and to issue an award final and binding upon both parties to the dispute.

The Act defines "major disputes" as those that relate to "the formation of collective agreements or efforts to secure them" and concern "the acquisition of rights for the future, not [the] assertion of rights claimed to have vested in the past." *Elgin, J. and E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). The Act defines "minor disputes" as those that "concern issues as to whether an existing agreement controls the controversy, i.e., the interpretation or application of a particular provision to a particular situation." *International Ass'n of Machinists v. Frontier Airlines*, 664 F.2d 538, 540 (5th Cir. 1981). Congressional intent was to keep most minor disputes out of federal court; indeed, this Court and others have described the range of judicial review of NRAB decisions as "among the narrowest known to the law." *E.g., Del Casal v. Eastern*

Airlines, Inc., 634 F.2d 295, 298 (5th Cir.), *cert. denied sub nom, Air Line Pilots Assoc. International v. Pelaez Del Casal*, 454 U.S. 892 (1981).

However, in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court held that judicial review of NRAB orders is available on three specific grounds: (1) failure of the Board to comply with the requirements of the Railway Labor Act; (2) failure of the Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption.

B. Factual Background

Willis was employed by The Atchison, Topeka, and Santa Fe Railway Company ("the railroad") as a locomotive engineer, beginning in 1977. R 564.[1] Respondent Burlington Northern and Santa Fe Railway Company ("BNSF") is the successor in interest to The Atchison, Topeka, and Santa Fe Railway Company. *Id.* The railroad and BNSF are interstate carriers subject to the Railway Labor Act. Willis's employment with BNSF was governed by a collective bargaining agreement between BNSF and the Brotherhood of Locomotive Engineers ("the union"). *Id.*

Willis asserted that during his employment, the railroad and the union agreed to seek the termination, on pretext, of employees with collective bargaining agreements, so as to hire new employees who would be given less desirable contracts. R 5. Willis alleged that on two occasions he was one of the employees targeted in this

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[1] Record citations follow the abbreviations used in the court of appeals for the Clerk's Record (R).

employment "policy." In the second incident, which eventually led to this suit, Willis was hospitalized for seven weeks. R 160. After his release, Willis presented a physician's release to the railroad and attempted to return to his job. R 147. Willis was instead placed on medical leave of absence, without pay, for over three years. R 160, 334.

The union requested that the railroad investigate why Willis had been unable to return to work for three years and what was necessary for him to do so. R 304-05. When the railroad responded, it indicated that Willis needed to complete two medical forms and his failure to do so would result in "possible disciplinary action for noncompliance with Carrier rules." R 307. Willis completed the forms. R 308. Two months later, the railroad requested Willis complete the forms again. From the record, it does not appear the forms were completed a second time before the railroad notified Willis to appear for investigation of violations of work rules related to the failure to provide the medical forms.

Under the provisions of the collective bargaining agreement, investigations were required to commence within 30 days "from the date of occurrence of the incident to be investigated." R 159. Willis claimed the "incident" began when the railroad placed him on medical leave with his consent in 1991. The railroad claimed that it was charging Willis with violations as of May 1994, and would hold its formal investigation in June 1994, thus meeting the 30-day rule. R 124.

After the railroad's investigation was completed, the company superintendent dismissed Willis. R 232. Willis,

individually or through the participation of the union, appealed the decision of the railroad superintendent through various levels. R 217, 348, 356-57, 370, 371, 433. Willis eventually reached arbitration to the National Railroad Adjustment Board, First Division. R 411. The arbitration hearing took place in September 1996. Two representatives of the First Division informed Willis that a ruling and award should be expected in two to six months. R. 427. Willis objected in June 1997 when no award had been rendered. In July 1997, Willis again objected to the Board's refusal to render the award. R. 426. Willis stated that he was suffering financial harm from the delay. In September 1997, Willis objected to the Arbitrator, stating in detail the hardship he suffered from the NRAB's delay. R 424-45. In October 1997, Willis objected for a fourth and fifth time to the Board's failure to promptly render an award, observing that the authority of the Arbitrator should expire after a reasonable time. R 419-21. The Board finally issued its award fourteen months after the arbitration hearing, denying Willis's claim in November 1997. R 346-50. The award was not attested by the Board's secretary, and was not signed by any Board member present at the arbitration hearing and thus competent to make the award. R 346.

C. Proceedings Below

1. Willis filed suit in the district court, alleging the NRAB had properly accepted Willis's grievance, but had rendered an untimely and unsigned award. R 42. Willis further alleged the NRAB had exceeded its authority in

rendering the award. BNSF moved for summary judgment, asserting Willis had failed to meet any of the exceptions to finality of NRAB awards. R 183, 185. The district court thereafter granted BNSF's summary judgment motion. App., *infra*, 3a-27a.

2. A panel of the Fifth Circuit affirmed the summary judgment. App., *infra*, 1a-2a. In four sentences, the panel held that the NRAB had complied with the requirements of the Railway Labor Act; had acted within its jurisdiction; and that there was no evidence of fraud or corruption. The court did not apply any analysis of the law to the facts, and therefore it is unclear whether the court considered Willis's arguments as within the scope of judicial review, but without merit, or simply not subject to review.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted to insure that the Railway Labor Act achieves its intended purpose. The Court has observed that by enacting this legislation, "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements." *Sheehan*, 439 U.S. at 94. Willis submits that promptness of resolution is a matter at the heart of the institutional competence of the National Railway Adjustment Board,

and promptness of settlement is consistent with the Railway Labor Act's intent to promote stability in labor relations.

A. The Court should clarify the scope of judicial review that exists even in the limited *Sheehan* circumstances

The scope of judicial review of the Act is an important question of federal law. This Court should hold that the provision in the Railway Labor Act for "prompt and orderly settlement" of railroad labor disputes has substantive and enforceable meaning, and that the Railway Labor Act's requirements for a competent award should be confirmed and enforced. Review is also necessary to establish a "reasonable time" rule for arbitration awards.

B. The requirement for prompt settlements is substantive

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Applying such rules of construction, settlements of railway labor disputes must be "prompt," since this word is unambiguous and must be assumed to accurately state a Congressional purpose. Thus, the failure of the NRAB to issue a prompt, timely award is also a failure of the Board to comply with the requirements of the Act. Such a claim should be actionable in district court pursuant to 45 U.S.C. § 153(q).

There is doctrinal support for Willis's position. In *Jones v. St. Louis-San Francisco Ry.*, 728 F.2d 257, 261-63 (6th Cir. 1984), the court reviewed the failure of the Board to comply with the requirements that its decision be rendered by a three-member board, and to render its award timely. The Sixth Circuit held that a decision of a Public Law Board that was rendered fourteen months after a hearing was untimely, and as a result, the Board had lost jurisdiction. The Public Law Board differed from the Board here as it was established by a private agreement between the railroad and the union; its function, however, was the same as the NRAB. *Id.* The private agreement between the railroad and union required the board to render its award within fifteen days of the hearing. Jones argued that after the fifteen days had expired, the Board lost jurisdiction. The court of appeals disagreed, however, because the private agreement did not unequivocally state that jurisdiction terminated on the sixteenth day. The court held the better rule was that the arbitrator's authority expired after a "reasonable time" beyond the period originally fixed. *Id.*

And in *Lodge No. 725, International Association of Machinists v. Mooney Aircraft, Inc.*, 410 F.2d 681 (5th Cir. 1969), a collective bargaining agreement provided that a decision had to be rendered within three days of hearing. An award under the Labor Management Relations Act, 29 U.S.C. § 185, was made in 44 days, and the company claimed it was therefore invalid. The union contended the company had not objected to the failure to comply with the time limits until after the award issued. The court of appeals held that an arbitrator's failure to render an award on a timely basis did not invalidate an award

absent either an objection by or prejudice to the losing party, unless the agreement to arbitrate provided that the timeliness of the decision was jurisdictional.

Willis disagrees with the lower courts' conclusion that 45 U.S.C. § 151a(4) is an articulation of purpose only and unworthy of consideration as a requirement of the Act imposed on the NRAB. *Brotherhood of Railway and Steamship Clerks v. Norfolk So. Ry. Co.*, 143 F.2d 1015 (4th Cir. 1944), is instructive. In *Norfolk*, the railroad and union disagreed over a possible modification of the existing employment agreement. Unable to resolve the issue through mediation, the parties agreed to arbitration. The Railway Labor Act requires such an agreement provide the period for the board to make its award. The parties agreed the award would issue in 15 days, but the award was not filed until 91 days after the hearing. *Id.* at 1016-17.

The railroad filed a petition under section 159 Third of the Act, which stated an award could be vacated if it did not conform to the substantive requirements of the chapter or if the proceedings were not substantially in conformity. The Act further provided the validity of awards was to be favored and that awards should not be set aside for "trivial irregularity." A judgment vacating the award was thereafter entered by a district court.

The court of appeals affirmed, in part based on section 151a(4) and its requirement for "prompt" settlement of disputes. The court correctly observed that "[h]ad the word 'prompt' been intended to hold no significance, it would have been an easy matter for Congress to have deleted it entirely." *Norfolk*, 143 F.2d at 1017. The court

further noted that time is of the essence in arbitration at common law, and that it assumed Congress had legislated in light of that law. The court also observed that an objection to untimely filing was not trivial but very substantial, attacking the very existence and innate validity of the award itself. While the court was primarily persuaded by the statutory requirement that the arbitration agreement fix the time for filing, its observations and concerns are applicable here too: without a limitation on the time for an award, settlement of disputes could be greatly delayed by mere failure on the part of arbitrators to act.

The courts below rejected Willis's arguments that the failure of the Board to render its award promptly was a failure to comply with the Railway Labor Act. Among other reasons, the district court noted that *Jones v. St. Louis-San Francisco Ry.*, 728 F.2d 257 (6th Cir. 1984) articulated a "reasonable time" rule for awards of arbitrators which the Fifth Circuit had yet to even adopt. App. *infra*, at 24a.

Although presented the opportunity to adopt such a rule in this case, the court of appeals declined to give substance to section 151a(4). Further review by this Court is therefore necessary to provide a uniform national rule for timeliness of awards.

C. An NRAB award must reflect it was competently made if stable labor relations are to be promoted

Review by this Court is appropriate for the additional reason that the courts below failed to give meaning to section 153(n) of the Act.

The record established that the award at issue was not signed by any Board members, and was not attested by the NRAB secretary. The need for signature and attestation is made clear by reference to 45 U.S.C. § 153(n) of the Act. That provision states that a majority vote of all members of the division of the Adjustment Board eligible to vote shall be "competent" to make an award with respect to the dispute submitted to it. Unless the award is signed and attested to, there is no certainty that the correct members or appropriate number of members made the award.

In *Jones v. St. Louis-San Francisco Ry.*, 728 F.2d 257 (6th Cir. 1984), the court of appeals construed subsection (n) of the Act to entitle the parties who appear before the Board the right to be heard by a three member Board, a majority of whom must then agree in order to resolve the dispute at hand. The court therefore held that the provisions of the Act require that in order to have a valid award, a majority of the Board must hear the parties and participate in the decisionmaking process before rendering an award. *Id.* at 262.

In this case, there was no record that any of three members of the NRAB participated in the issuance of the award, since the NRAB secretary did not attest the award. Willis's objection in that regard was a challenge to the validity of the award itself. Because the Board's secretary did not attest the award, the Board did not comply with its rules and therefore did not confine itself to its jurisdiction. Furthermore, the award did not reflect that the panel members competent to make the award actually participated in rendition of the award. This renders the

award invalid, and the actions of the Board not in compliance with section 153(n) of the Act, which itself is reviewable under section 153(q). But the district court held that given the limited scope of jurisdiction, a lack of signatures or attestation should not be fatal. In so holding, the construction of the Railway Labor Act by the courts below overly embraced this Court's *Sheehan* decision so as to preclude even appropriate judicial review.

A proper interpretation of the Act would allow judicial review of the circumstance presented here, thereby promoting timely and competent awards. This Court's review is necessary to obtain that proper and instructive interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20404
Summary Calendar

G.A. WILLIS,

Plaintiff-Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, also known as Burlington Northern Santa Fe,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston
(USDC No. H-97-CV-3946)
FILED DEC 15 2000

Before REAVLEY, DeMOSS and BENAVIDES, Circuit Judges.

PER CURIAM:*

Gregory A. Willis appeals from summary judgment upholding a National Railway Adjustment Board arbitral award. We affirm the judgment of the district court for the following reasons: (1) the board complied with all requirements of the Railway Labor Act; (2) it acted within

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

the scope of its jurisdiction; and (3) there is no evidence of fraud or corruption. Our review is limited to these grounds. *See* 45 U.S.C. § 153 First (q); *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GREGORY A. WILLIS,	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No.
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,	§	H-97-3946
	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 31, 2000)

Pending before the Court in the above-referenced action are Plaintiff Gregory A. Willis's Motion for Summary Judgment (Instrument #26) and Defendant Burlington Northern and Santa Fe Railway Company's Motion for Summary Judgment (Instrument #30). After reviewing the record, the arguments of counsel, and the applicable law, the Court concludes that Plaintiff's motion should be **DENIED**, and that Defendant's motion should be **GRANTED**.

I. BACKGROUND

In this case, Plaintiff Gregory A. Willis ("Willis") seeks from this Court a reversal of a National Railway Adjustment Board ("NRAB") arbitral award. Willis now files for summary judgment to that effect. Burlington Northern and Santa Fe Railway Company ("BNSF")

responds by arguing that Willis cannot establish the narrow exceptions under the Railway Labor Act that would require the reversal he seeks. As a result, BNSF has filed for summary judgment in its own favor.

The essential facts in this case are not in dispute. BNSF operates one of the largest rail transportation systems in the United States and is an "employer" and a "carrier" as those terms are defined in the Railway Labor Act, 45 U.S.C. § 153 (1986). BNSF is the successor-in-interest to The Atchison, Topeka and Santa Fe Railway Company.[1] The Brotherhood of Locomotive Engineers ("the Brotherhood") is an unincorporated labor organization which represents certain BNSF employees in train service, such as conductors and locomotive engineers. Plaintiff Willis was hired by The Atchison, Topeka and Santa Fe Railway Company as a locomotive engineer in 1977.

At all relevant times, Willis's employment was governed by the terms of a collective bargaining agreement ("the Agreement") between BNSF and the Brotherhood. The Agreement between BNSF and the Brotherhood, dated October 1, 1977, has been amended from time to time but in all relevant aspects is still in effect. The Agreement governed the terms of Willis's employment with BNSF.

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[1] For the sake of simplicity, the Court will refer to BNSF and all predecessors as "BNSF" throughout its Memorandum Opinion and Order.

The Agreement between BNSF and the Brotherhood provided certain rules concerning the conduct of investigations and the assessment of discipline with regard to employees. Pursuant to the Agreement, employees may not be dismissed from service unless they are first afforded an investigation. They must be notified of the investigation within thirty days from the date of the occurrence that is to be investigated.

Willis was hospitalized on November 7, 1990 and released on December 20, 1990. Thereafter, he attempted to return to work on January 2, 1991, but Defendant BNSF placed him on medical leave of absence without pay for over three years. Willis requested a return to work and presented to BNSF his doctors' releases authorizing his return to work. According to BNSF, Willis was put on medical leave until he property submitted medical release forms 2820 and 2805.

Three years passed without Willis submitting the specific medical release forms, and without BNSF allowing Willis to return to work.

On May 26, 1994, Willis was notified in writing of an investigation into alleged wrongdoing on his part. The investigation notice concerned Willis's "alleged failure to comply with instruction in providing medical information to Dr. Khuri, Santa Fe Medical Director, as instructed per letter May 5, 1994." The notice also indicated that the investigation concerned Willis "allegedly being absent without leave beginning May 16, 1994."

On May 29, 1994, Willis responded in writing that he would attend the investigation hearing. That hearing was held on June 13, 1994, which was within thirty days of the

May 26, 1994 notice of investigation. Following the investigation hearing, BNSF terminated Willis's employment on June 27, 1994.

On August 2, 1994, Willis appealed his employment termination, but the appeal was declined by BNSF. On September 12, 1994, he appealed the decision to John Fleps, Vice President Labor Relations; Fleps denied the appeal in a lengthy letter dated October 27, 1994.

Willis then filed a lawsuit in the Southern District of Texas, case number 94-4166, asking this Court to bypass the mandatory bargaining procedures outlined in the Railway Labor Act. Judge Kenneth Hoyt dismissed the suite on March 15, 1995 for Willis's "failure to exhaust grievance and arbitration remedies as required by the Railway Labor Act." Following this dismissal, Willies [sic] then agreed to conference his case with Milton Siegele, BNSF's designated representative. The conference of the case did not bring about a resolution, so Willis then filed a submission with the National Railroad Adjustment Board requesting review of the case.

The NRAB heard Willis's case, with a neutral arbitrator presiding, and on November 5, 1997, issued Award No. 24860 declining Willis's claim. Specifically, the NRAB found that Willis was properly terminated:

> Upon full consideration of the entire record and the arguments raised by the parties, the Board finds that there is substantial evidence to support the Carrier's decision to discharge Claimant.
>
> . . . We further find that the discipline assessed Claimant was not arbitrary, capricious

> or excessive in light of his disciplinary history and his persistent refusal to provide the medical information requested by the Carrier.

On December 4, 1997, Willis filed the instant action in this Court, asking for a review of the arbitral award and asking this Court to determine if the Railway Labor Act and the Agreement were followed.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 315 (1986)). "This burden is

not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871-73 (1990); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

III. DISCUSSION

A. The parties' arguments.

In this case, the parties have filed cross-motions for summary judgment. Plaintiff Willis's motion for summary judgment argues that Willis is entitled to reversal of the NRAB's decision because Defendant BNSF failed to comply with the mandatory grievance procedures as required by the Collective Bargaining Agreement and the Railway Labor Act. Specifically, Willis claims that the NRAB did not correctly follow the Agreement nor the Railway Labor Act because (1) BNSF should have begun its investigation in 1991 instead of 1994, as well as conference Willis's grievance with the proper designated representative; (2) the NRAB effectively committed fraud by

disregarding Willis's arguments and evidence; (3) the NRAB lost jurisdiction because its award was not rendered within a reasonable time; and (4) the award was not signed by panel members and attested to by the Secretary of the NRAB.

In response, Defendant BNSF files its own motion for summary judgment, in which it disputes each of Willis's four arguments. Moreover, BNSF frames the issues of this case as being twofold: (1) whether Willis has established that whether Willis has established that judicial review of an NRAB decision is appropriate under any of the limited exceptions permitting review, and (2) whether this Court lacks jurisdiction over wrongful discharge claims that arise out of the Railway Labor Act and the collective bargaining agreement. Defendant's two issues, however, essentially distill into one singular argument: that Willis hasn't shown that the NRAB decision should be properly overturned under the applicable statutory limitations.

B. The Railway Labor Act.

The parties agree that both the Railway Labor Act ("RLA") and the collective bargaining agreement control the issues in this case. Generally, all disputes growing out of grievances or out of the interpretation or application of a collective bargaining agreement are preempted by the RLA's mandatory arbitration provisions. *Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278, 280 (5th Cir. 1995) (citing 45 U.S.C. § 151a). One of the goals of the RLA is to "provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates

of pay, rules, or working conditions." *Id.* (quoting 45 U.S.C. § 151a). Because such disputes concern an existing collective bargaining agreement, they "seldom produce strikes" and are known as the "minor disputes of the railway labor world." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723-24 (1946). Minor disputes are to be contrasted with "major disputes," which "present the larger issues about which strikes ordinary arise" because they "seek to create rather than to enforce contractual rights," *see id.*, and with those disputes that seek neither to create nor enforce the contractual rights created by a collective bargaining agreement. Under the RLA, only minor disputes "may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board" ("NRAB") for arbitration." *Id.* (quoting 45 U.S.C. § 151a). Moreover, the arbitration procedures provided by the RLA for minor disputes are mandatory in nature. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972) ("Any notion that the arbitration procedures provided by the RLA for minor disputes is optional is not longer good law.").

Thus, because the instant case involved a "minor dispute" as such is defined in the case law, Willis's grievance had to be resolved by mandatory, binding arbitration before an RLA adjustment board, with only limited review under § 153 First (q) of the RLA. In this context, courts have limited jurisdiction to review any NRAB decisions because "Congress specifically intended in the RLA to keep railroad labor disputes out of the courts and instead requires the use of grievance procedures and arbitration." *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986). Stated another way, courts lack

subject matter jurisdiction over controversies which are subject to the mandatory and exclusive arbitration provisions of the RLA. *International Ass'n of Machinists*, 850 F.2d 368, 376-77 (8th Cir. 1988). Inherent in this principle is courts' trust in the institutional competence of the NRAB with regard to railroad labor relations. *See, e.g., Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 (1965) (stating that Congress provided for mandatory arbitration of workplace grievances by "representatives of management and labor peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world"); *Whitehouse v. Illinois Cent. R.R.*, 349 U.S. 366, 371 (1955) ("[T]he railroad world is like a state within a state. Its population . . . has its own customs and its own vocabulary, and lives according to rules of its own making."); *Slocum v. Delaware, L. & W. R.R.*, 399 U.S. 239, 243 (1950) (observing that RLA arbitrators "understand railroad problems and speak the railroad jargon").

Such deference demonstrated by the courts has, as a result, translated into courts having virtually "no authority to rehear matters finally decided by [RLA arbitral board] awards." *Rosen v. Eastern Air Lines*, 400 F.2d 462, 463-63 (5th Cir. 1968). This rule has been consistently followed by the Fifth Circuit. *See, e.g., id.; Southern Pac. Co. v. Wilson*, 378 F.2d 533 (5th Cir. 1967); *Hodges v. Atlantic C.L.R. Co.*, 363 F.2d 534 (5th Cir. 1966).

Thus, when a plaintiff seeks to challenge an award issued by the NRAB, he is limited to the remedies set forth in the review provisions of the RLA, 45 U.S.C. § 153 First (q). That provision states in part:

> If any employee . . . is aggrieved by any of the terms of an award [made by the Adjustment Board] or by the failure of the division to include certain terms in such award, then such employee . . . may file in the United States district court. . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure if the division to comply or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U.S.C. § 153(q) (1986). The Supreme Court has clarified § 153 First (q) to mean that judicial review of NRAB awards are confined to three specific instances: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform or confine itself to matters within the scope of the its [sic] jurisdiction; and (3) fraud or corruption by a member of the Board. *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978) (per curiam).[2]

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[2] The Fifth Circuit also recognizes that a Plaintiff may challenge NRAB actions which violate constitutional due process. *See Southern Pac. Co. v. Wilson*, 378 F.2d 533, 536-37 (5th Cir. 1967) Plaintiff has not made any such argument in the instant case.

In sum, the remedies outlined in this provision of the RLA allows for a "range of judicial review in [that is] among the narrowest known to the law." *Diamond v. Terminal Ry. Ala. State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

C. Plaintiff's first claim: BNSF failed to comply with the RLA § 152 Seventh.

Plaintiff first argues that the NRAB's award violated 45 U.S.C. § 153(q) because the NRAB failed to comply with the requirements of § 152 Seventh, which provides that "[n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. §152 Seventh (1986). Plaintiff's argument here is that the NRAB essentially allowed BNSF unilaterally to modify the terms of the Collective Bargaining Agreement because the NRAB condoned (1) BNSF's untimely investigation of Plaintiff's case, and (2) BNSF's failure to conference Plaintiff's dispute with appropriate representative.

At the outset, the Court notes that, because the instant case involves a "minor" dispute, Plaintiff's reliance on § 152 Seventh is misplaced. Section 152 Seventh does not apply to minor disputes; rather, it applies only to major disputes. *See Conrail v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (observing that § 152 Seventh is one of the two "statutory bases for the major dispute category"); *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Airline Div. v.*

Braniff Int'l Airways, Inc., 437 F.2d 1272, 1274 (5th Cir. 1971) (citing § 152 Seventh and 156 as statutes that "bring[] into play the major dispute provisions of the [RLA]"). Essentially, Plaintiff takes the mistaken argument that the NRAB, in deciding Plaintiff's minor dispute, failed to comply with a statute that expressly deals only with major disputes. The Court thus holds that Plaintiff's first claim, in which he invokes § 152 Seventh, is without merit as a matter of law.

Nevertheless, assuming *arguendo* that Plaintiff had a legitimate basis in the RLA for his procedural claims, the Court finds that the NRAB decision regarding those claims should not be disturbed. Before this Court can decline to enforce an NRAB arbitration award, the award must be "without foundation in reason or fact." *Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969). As the Fifth Circuit has stated,

> To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obvious drawn, from the letter or purpose of the collective bargaining agreement. If there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract, that is, if an award is "without foundation in reason or fact," the award lies beyond the arbitrator's jurisdiction.

Id. at 411-12. Using this standard of review, the Court finds that the NRAB's award to be rationally inferable from the Collective Bargaining Agreement and founded in reason and fact.

Plaintiff first specifically contends that BNSF violated its own Collective Bargaining Agreement when it failed to investigate Willis's suspension within the thirty days mandated by the Agreement. The Agreement specifically states that "Investigations will be held promptly, but in any event not later than thirty (30) days from the date of occurrence of the incident to be investigated. . . . " It is undisputed between the parties that Defendant BNSF notified Willis of its investigation on May 26, 1994 and actually conducted its investigation hearing on June 13, 1994. Willis, however, contends that BNSF's investigation should in fact have begin around January 1991 because it was in January 1991 that Willis unsuccessfully attempted to return to work by presenting BNSF with his doctor's release authorizing his full return to work.

However, the NRAB award evinces that the NRAB did consider Plaintiff's arguments, as well as the record, with regard to the appropriate time line to follow in coming to its decision. As the Board stated, "Claimant has raised numerous jurisdictional and procedural arguments, including timeliness of the investigation and post-dismissal conference. . . . The Board has carefully considered each of Claimants jurisdictional and procedural contentions, and finds them to be without merit." This explanation demonstrates that the NRAB award considered Plaintiff's various arguments regarding the thirty-day time frame.

Moreover, the summary judgment evidence validates the NRAB's holding. BNSF accused Plaintiff of various wrongdoings on May 15, 1994; the investigative hearing with regard to those allegations occurred on June 13, 1994. That the NRAB found May 15, 1994 to be the

appropriate trigger to the thirty-day period is reasonably borne out in the record: "Carrier wrote Claimant advising him that he was being given a final notice to submit the properly executed forms no later than May 15, 1994," and "after Claimant failed to submit the completed medical release forms, he was served with a Notice of Investigation [which] was held on June 13, 1994." As such, the Court finds that, as a matter of law, the NRAB award regarding the appropriate time line was "rationally inferable . . . from the letter or purpose of the collective bargaining agreement," and that the award had "foundation in reason or fact." *Id.*

Plaintiff's second argument under § 152 Seventh, statutory deficiencies notwithstanding, is that BNSF violated the collective bargaining agreement because it failed to conference Plaintiff's dispute with the "designated representative" of the carrier.[3] According to the collective bargaining agreement, BNSF's "designated representative" is the "general manager who is the carrier's highest

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[3] The Court notes that Plaintiff's argument here is ostensibly premised on RLA § 152 Sixth, but is fundamentally premised on RLA § 153 Seventh. Section 152 Sixth merely states that a carrier is to conference a dispute with its "designated representative." 45 U.S.C. § 152 Sixth (1986). According to the collective bargaining agreement, BNSF's "designated representative" is the "General Manager who is the carrier's highest officer of appeal for cases involving discipline." Plaintiff's argument here is that BNSF failed to conference his dispute with the proper designated representative, which constituted a breach of the collective bargaining agreement. Such an argument essentially folds into Plaintiff's § 153 Seventh claim that BNSF failed to comply with its own collective bargaining agreement.

officer of appeal for cases involving discipline." Plaintiff here complains of the fact that BNSF conferenced his dispute with Milton Siegele, its Director of Labor Relations, rather than its General Manager. Moreover, Plaintiff notes that the Director of Labor Relations is not even the highest officer of appeal. As a result, Plaintiff's basic position is that the NRAB decision was wrong because it essentially ratified BNSF's noncompliance with its own collective bargaining agreement.

Again, assuming *arguendo* that § 152 Seventh is a proper RLA basis for Plaintiff's claim, the Court nevertheless finds that Defendant BNSF is entitled to summary judgment because Plaintiff has failed to show how the NRAB's decision on this matter was irrational or without reasonable foundation in the record. As noted above, the NRAB itself stated that it "carefully considered each of [Plaintiff's] . . . procedural contentions, and [found] them to be without merit." Indeed, § 152 Sixth requires only that the carrier send a "designated representative" to the conference. 45 U.S.C. § 152 Sixth (1986). The summary judgment record shows that John Fleps was the highest designated officer for grievances at BNSF, and that Plaintiff initiated a conference with him. Plaintiff's actual dispute, however, was conferenced by Milton Siegele, who was the representative designated by Fleps. The NRAB panel considered these facts and concluded in favor of BNSF. The Court finds that such a conclusion is rationally inferable, and, as a result, is valid as a matter of law.

D. Plaintiff's second claim: the NRAB committed fraud.

Based on the same arguments above, Plaintiff next claims that the NRAB committed fraud because it "totally disregard[ed] Plaintiff's arguments and evidence in arriving at its decision in favor of Defendant." Citing *Pacific and Arctic Ry. And Navigation Co. v. United Trans. Union*, 952 F.2d 144 (9th Cir. 1991), Plaintiff bases his fraud claim on the notion that "fraud properly embraces a situation in which the supposedly neutral arbitrator exhibits a complete unwillingness to respond, and indifference, to any evidence or argument in support of one party's position." (Pl's. Supp. Mot. for Summ. J. at 14.) Based on the Court's discussion above, however, the Court holds that the NRAB's decision was not without basis in reason or fact with regard to Plaintiff's two procedural challenges. As a result, the Court finds that Plaintiff's fraud claim, sprung from the notion that the NRAB award lacked all reason and fact, is without merit as a matter of law.

Moreover, the Court notes that the statutory basis for Plaintiff's fraud claim is 45 U.S.C. § 153(q), which states that a court can review an NRAB award if a plaintiff can establish "fraud or corruption by a member of the board making the award." 45 U.S.C. § 153(q) (1986). None of Plaintiff's summary judgment evidence establishes that the neutral, Katherine Gerstenberger, or the other NRAB panel members on Plaintiff's dispute, Mr. Raddick and Mr. Fingerhut, acted fraudulently. The Court finds that no facts in the record suggest that these three NRAB board members engaged in fraud or corruption. As a result,

Plaintiff's fraud claim fails to meet the narrow parameters of § 153(q).

That Plaintiff argues that Milton Siegele committed fraud is of no moment. The record indicates that Siegele did not represent BNSF before the NRAB in Plaintiff's dispute, nor was he an NRAB panel member in Plaintiff's case. *See DeClara v. Metropolitan Transp. Auth.*, 748 F. Supp. 92, 95 (S.D.N.Y. 1990) (holding that a plaintiff's allegation of fraud on the part of defendants precluded the court's review of a Special Adjustment Board's award under § 153(q) because the plaintiff was not alleging fraud by a member of the Board). Indeed, even if Siegele had been a panel member on Plaintiff's case, Plaintiff has failed to show how Siegele committed fraud.

E. Plaintiff's third claim: NRAB had exceeded its jurisdiction.

In its third argument, Plaintiff Willis contends that the NRAB order "failed to conform or confine itself to matters within the scope of its jurisdiction." (Pl's. Supp. Mot. for Summ. J. at 8.) Like Plaintiff's fraud claim, Plaintiff's jurisdictional claim stems from the same basic argument that Plaintiff made with regard to § 152 Seventh: that the NRAB's award was "wholly baseless" and "without foundation in reason or fact." *Brotherhood of R.R. Trainmen*, 415 F.2d at 411-12. Plaintiff here recycles his argument regarding the thirty-day period for investigations. Such an argument, packaged once under § 153 Seventh and then repackaged as a fraud claim, remains without merit in its third incarnation as a jurisdictional claim. As the Court has already noted, the NRAB's award

demonstrates that it "carefully considered each of Claimant's jurisdiction and procedural contentions, and [found] them to be without merit." Because the Court finds that the NRAB's award drew a rational relation to the facts before the Board and now before the Court, it merits judicial enforcement. *See id.*

Plaintiff does, however, make one additional argument under the aegis of his jurisdictional claim: he argues that the NRAB exceeded its jurisdictional authority when it ratified BNSF's requirement that Plaintiff submit medical release Forms 2802 and 2820. In particular, Plaintiff states that "there was absolutely no evidence presented before the NRAB" that BNSF's "custom and practice" required Willis to submit the two medical release forms. Additionally, Plaintiff states that BNSF could not point to any rule or regulation that called for Plaintiff to be placed on medical leave in 1991. Given that BNSF could not justify its authority to take such measures against him, the argument goes, the NRAB award was wrong in endorsing BNSF's actions.

The Court disagrees. Although Plaintiff's jurisdictional argument attacks the NRAB's factual findings, the Court cannot reverse the NRAB because the Board retains jurisdiction so long as the award derives its essence from the collective bargaining agreement and is not wholly irrational. *Diamond v. Terminal Ry. Ala. State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

Such is the case here. The NRAB clearly interpreted the Agreement with regard to Plaintiff's medical release forms. As the NRAB decision stated,

> The evidence establishes that Carrier issued Claimant clear instructions to execute and submit medical release forms 2802 and 2820, and gave him extensions of time in which to comply with these instructions. It was not unreasonable for Carrier to require Claimant to submit the forms in view of his lengthy absence from work due to medical reasons. Moreover, the requirement that he submit the forms conformed to Carrier's longstanding practice. Claimant refused to return the completed forms, however, even after repeated requirements from the Carrier to do so. Claimant's uncooperative attitude was further demonstrated by his refusal to testify at the Investigative Hearing.
>
> We find no basis in the record upon which to relieve Claimant of his obligation to file the medical release forms required by the Carrier. We further find that the discipline assessed Claimant was not arbitrary, capricious or excessive in light of his disciplinary history and his persistent refusal [sic] provide the medical information requested by the Carrier.

The record thus reveals that the NRAB did consider Plaintiff's arguments regarding the medical release forms and his medical leave of absence in light of the collective bargaining agreement.

As to Plaintiff's claim that BNSF failed to point to specific provisions in the collective bargaining agreement that mandates the submission of medical release forms 2802 and 2820, the Court finds the argument without merit. The summary judgment evidence shows that Willis disobeyed a clear order when he neglected to submit the requested forms. Moreover, Plaintiff has not pointed to

any evidence that BNSF's actions, and the NRAB's subsequent ruling on those actions, failed to observe a reasonabl [sic] nexus with the collective bargaining agreement.

Plaintiff's final jurisdictional argument is that NRAB award was not rendered within a reasonable time, and that, as a result, the NRAB "lost jurisdiction." (Pl's. Supp. Mot. for Summ. J. at 15.) The record indicates that the NRAB decision came fourteen months after its hearing on Plaintiff's dispute. In making his argument, Plaintiff depends largely on the Sixth Circuit's opinion in *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257 (6th Cir. 1984). that case held that a Public Law Board decision that came fourteen months after the hearing date was untimely, and as a result, without jurisdiction. *See id.* at 265.

The *Jones* holding [sic] inapplicable to the instant facts, however. The Court first notes that *Jones* involved a public law board, not the NRAB. While public law boards are similar to the NRAB in that both are authorized pursuant to 45 U.S.C. § 153, *see Brotherhood v. St. Louis Southwestern Ry.*, 676 F.2d 132, 135 n.2 (5th Cir. 1982), public law boards differ from the NRAB in one salient aspect. Importantly, public law boards' "jurisdiction is limited to the jurisdiction that is conferred thereupon by the agreement between the carrier and the union." *Jones*, 728 F.2d at 264 (citing *Switchmen's Un. Of N. Am. v. Clinchfield R.R. Co.*, 310 F. Supp. 606, 610 (E.D. Tenn. 1969)). By contrast, the NRAB is a governmental entity created by Congress through enactment of the RLA. The NRAB's jurisdiction is governed by the RLA and the regulations promulgated by the NRAB. *See* 45 U.S.C. § 1353 (1986); 28 C.F.R. § 1201 *et seq.*

Indeed, it was upon the *Jones* parties' agreement that the *Jones* court defined the appropriate framework for timeliness with regard to the arbitration award. the agreement in that case stated that, "Unless otherwise agreed by the partisan members, the Board shall, within 15 days following completion of the hearing on each case, make findings of facts and render an award on each case submitted to it. . . . " *Jones*, 728 F.2d at 264. The *Jones* court observed that, while at common law an arbitration award was automatically invalid if rendered after the time specified in the agreement, the more recent trend has seen courts holding "that the authority of the arbitrator does not expire until after a reasonable time beyond the original time limitation provided in the agreement." *Id.* at 265 (quoting *International Bhd. to Teamsters v. Anchor Motor Freight, Inc.*, 415 F.2d 220, 226 (3rd Cir. 1968).

The *Jones* court thus went on to articulate the rule that unless parties "state in unequivocal language whether they intend for the arbitrators to lose their jurisdiction if they render a late award," *id.* (citation omitted), "the authority of the arbitrator will expire after *a reasonable time beyond the period originally fixed for the award has gone by.*" *Id.* (emphasis added). Because the agreement in *Jones* came after fourteen months despite an explicit fifteen-day time period, the board in that case "had long since lost jurisdiction to resolve [the] dispute." *Id.*

As noted above, the instant case involves not a public law board award, but an NRAB award. The Court thus looks to the RLA to define the contours of NRAB jurisdiction. That the *Jones* court premised the public law board's jurisdiction on the parties' agreement, rather than the RLA, indicates that case's inapplicability to the present

fact were before the Court. Moreover, even if *Jones* were substantively and procedurally controlling. Plaintiff in the instant case nonetheless has failed to point to any provision in the collective bargaining agreement that sets out a time period in which an NRAB award must be rendered.

The Court further notes that the Fifth Circuit has yet even to adopt the "reasonable time" rule that the *Jones* court articulated. Instead, the only arguable basis for Plaintiff's present claim can be found in § 151a(4) of the RLA, which states, "The purpose of this Chapter is . . . [to] provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." 45 U.S.C. § 151a(4) (1986). While such language articulates the purpose of the RLA, it does not mandate a specific time period in which a decision must be rendered. Indeed, Plaintiff has failed to point to any provision in the RLA or the collective bargaining agreement that was specifically violated by the timing of the NRAB award. Plaintiff has also failed to show how a period of fourteen months is so egregiously interminable that the NRAB necessarily lost jurisdiction as a matter of law. Defendant BNSF is thus entitled to summary judgment on the mater.

G. Plaintiff's fourth claim: NRAB award was not certified, and was thus null and void.

Plaintiff's final argument revolves around technical difficulties that Plaintiff perceives in the NRAB award, difficulties that Plaintiff contends render the award null and void. In particular, Plaintiff states that the "award

rendered was not signed by the Panel Members nor was it acknowledge and signed by the Secretary of the NRAB" in violation of the NRAB's own regulations (Pl's. Supp. Mot. for Summ. J. at 17.) NRAB Circular No. 1 provides that "[a]ll awards of the Adjustment Board shall be signed by order of the appropriate division thereof and shall be attested by the signature of the Secretary. . . . " Without the required signatures and attestation, Plaintiff argues, the award cannot be valid.

The Court disagrees. As an initial matter, the Court is unclear as to how Plaintiff's attack of the award based on technical deficiencies is proper under § 153 First (q). As noted above, judicial review of NRAB awards are confined to three specific instances only: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform or confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption by a member of the Board. 45 U.S.C. § 153 First (q)(1986). *See Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978) (per curiam) (noting the three instances for judicial review of NRAB awards). Plaintiff's argument fails to demonstrate under which prong his attack is proper. Indeed, the only RLA provision that involves the form of NRAB awards is § 153(m). That provision states, "The awards of the several divisions of the Adjustment Board shall be stated in writing." 45 U.S.C. § 153(m) (1986). Such a requirement was satisfied in the instant case.

Moreover, Plaintiff's reliance on the Fourth Circuit case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co.*, 143 F.2d 1015 (4th Cir. 1944), is inappropriate. The

court in that case vacated an arbitration award that, *inter alia*, did not contain "the signature of a majority of [the] board of arbitration affixed to their award" pursuant to § 158(g). This provision, however, applies to National Mediation Boards, not the NRAB. As Defendant points out, National Mediation Boards are responsible for adjudicating "any other disputes not referable" to the NRAB. 45 U.S.C. § 155 First (1986).

While it is undisputed that the NRAB panel members and Secretary failed to sign Plaintiff's arbitration award, the issue here is whether such failure necessarily equates to the Award being null and void, as Plaintiff asserts. Based on the requirements of RLA § 153(m) and the court's limited review jurisdiction under RLA § 153 First (q), the Court finds that the lack of signatures or attestation on the Award are not fatal, and that the Award should stand.

IV. CONCLUSION

Section 153 First (q) reflects Congress's intent to limit judicial review of NRAB arbitral decision to specific, narrow instances. As Judge Posner observes, the root question in the railroad arbitration context "is not whether the arbitrator or arbitrators erred in interpreting the contract, it is not whether they clearly erred in interpreting the contract, it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive." *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987) (citation omitted). Underlying this notion is the fundamental principle that courts may

review the actions of the NRAB, but not the actions of the carrier. Plaintiff's present suit asks this Court to overturn the award of the NRAB, but essentially asks the Court to revisit the actions of BNSF. The Court may not do so.

The summary judgment evidence in the instant case establishes that the NRAB's findings are rationally inferable from the facts before the Board, the dictates of the collective bargaining agreement, and the RLA. Additionally, the record and the applicable law does not reflect any fraud perpetrated by the NRAB, any unreasonableness with regard to the timeliness of the Award, or any fatal deficiency owing to the lack of signatures on the Award itself. Therefore, the Court finds that, as a matter of law, the NRAB award cannot be disturbed. Accordingly, the Court

ORDERS that Plaintiff's Motion for Summary Judgment is **DENIED**; and

ORDERS that Defendant's Motion for Summary Judgment is **GRANTED**.

SIGNED at Houston, Texas, this 31st day of March, 2000.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24860
Docket No. 44490
97-1-95-1-A-1975

The First Division consisted of the regular members and in addition referee Katherine Gerstenberger when award was rendered.

PARTIES TO DISPUTE: (G.A. Willis
(Burlington Northern Santa Fe Railway Company
((former Atchison, Topeka and Santa Fe Railway Company)

STATEMENT OF CLAIM:

"Claim of Engineer G. A. Willis for reinstatement to service with full back pay for all time lost as of January 2, 1991, with seniority and all other rights restored and unimpaired as a result of the investigation held June 13, 1994, at the Assistant Superintendent's Office of the Atchison, Topeka and Santa Fe Railway."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was employed by the Carrier as a locomotive engineer from April 7, 1979, until his dismissal on June 27, 1994. On November 4, 1990, Claimant was placed on a medical leave of absence after he was institutionalized. On January 2, 1991, Claimant presented the Carrier with a doctor's release, and requested to return to service. Carrier informed Claimant that under its policies, he could not return to active service until he had completed medical release forms 2820 and 2805. Claimant did not submit these forms and, consequently, was continued on medical leave of absence for approximately three years.

In October 1993, J. L. Hogan, General Chairman of the Brotherhood of Locomotive Engineers, wrote Carrier requesting information regarding Claimant's employment status. In response, Carrier sent Claimant copies of forms 2820 and 2805 on January 7, 1994, and advised him that the timely completion of these forms was necessary before his request to return to service could be considered. The Carrier further informed Claimant that his failure to comply with this procedure would subject him to

possible disciplinary action for noncompliance with Carrier Rules. Claimant was instructed to return the completed forms within thirty (30) calendar days from the date of the letter.

In a letter dated January 31, 1994, Claimant stated that he had completed forms 2820 and 2805, and that they were enclosed in his January 31 letter in a sealed envelope to preserve confidentiality. The sealed envelope had been addressed and stamped for mailing to Dr. R. K. Khuri, the Carrier's Medical Director, in Chicago, Illinois. Carrier mailed the sealed letter, but, since Dr. Khuri's office had moved to a new location, the letter did not arrive.

On March 15, 1994, after Dr. Khuri's office informed Carrier that it had not received Claimant's letter, Carrier sent Claimant another set of forms 2820 and 2805. Carrier also enclosed an envelope addressed to Dr. Khuri's new address, and advised Claimant that he must return the forms to Dr. Khuri no later than March 28, 1994. On March 30, 1994, Claimant requested until May 1, 1994, to file the completed forms. When the forms had not been received by Dr. Khuri's office by May 5, carrier wrote Claimant advising him that he was being given a final notice to submit the properly executed forms no later than May 15, 1994, and that his failure to do so would result in the scheduling of a formal Investigation for possible violation of Carrier Rules.

On May 26, 1994, after Claimant failed to submit the completed medical release forms, he was served with Notice of Investigation. The Investigative Hearing was

held on June 13, 1994. The purpose of the Investigation, as stated in the May 26 Notice, was to:

> " . . . develop all facts and place [Claimant's] responsibility, if any, in connection with possible violation of Rules 1.2.7 and 1.13 of the General Code of Operating Rules effective April 10, 1994, General Rules A, B, C, 1004 and 1018 of the Safety and General Rules effective June 30, 1993, and Superintendent's Notice S-50 effective April 10, 1994, concerning [Claimant's] alleged failure to comply with instructions in providing medical information to Dr. Khuri, Santa Fe Medical Director, as instructed per [Carrier's] letter of May 5, 1994 and allegedly being absent without leave beginning May 16, 1994."

Claimant was represented at the hearing by BLE General Chairman J. L. Hogan. At the hearing, Claimant refused to answer any questions regarding his failure to provide Carrier with completed copies of forms 2820 and 2805, stating "no comment" throughout his examination. He stated at the close of the hearing that since the Carrier had caused delays in his reinstatement, he was withdrawing his offer to return to work without back pay, and was requesting that he be returned to work with full pay and benefits.

As a result of the Investigation, Claimant was dismissed from employment on June 27, 1994. Claimant's dismissal was appealed by the Organization on August 2, 1994, and its appeal was denied by Carrier on August 17, 1994.

Claimant has raised numerous jurisdictional and procedural arguments, including challenges to the jurisdiction of this Board under the Railway Labor Act, the timeliness of the Investigation and post-dismissal conference, the fairness of the Investigation, including the credibility of the evidence and Carrier's failure to call certain witnesses, Carrier's failure to process Claimant's appeal in a timely fashion, and various alleged procedural errors in the formal record and Carrier's submission. The Board has carefully considered each of Claimant's jurisdictional and procedural contentions, and finds them to be without merit. We further find that the claim is properly before us.

With regard to the merits of the claim, Claimant argues that he did not request a medical leave of absence, but, rather, was improperly placed on medical leave by the Carrier. Claimant further submits that when he produced two doctors' releases stating that he was fully capable of performing his duties, the need for him to file forms 2805 and 2820 was eliminated. Moreover, Claimant maintains that Carrier acted in an arbitrary and capricious manner when it held Claimant out of service pending a hearing and then dismissed Claimant.

The carrier argues that it had just cause to dismiss Claimant. Carrier emphasizes that it has had a longstanding practice of requiring employees to submit medical release forms 2820 and 2805 prior to returning to active service from a medical leave of absence. Moreover, Carrier rules require employees to comply with instructions from supervisors, and prohibit employees from withholding information regarding unusual events or personal injuries. Claimant's refusal to comply with Carrier's

instructions to submit forms 2820 and 2802 [sic] violated these rules. Finally, Carrier asserts that Claimant's disciplinary record supports the discharge penalty. In this regard, Carrier notes that Claimant previously had been discharged on three separate occasions during his seventeen years of employment with the Carrier.

Upon full consideration of the entire record and the arguments raised by the parties, the Board finds that there is substantial evidence to support the Carrier's decision to discharge Claimant. The evidence establishes that Carrier issued Claimant clear instructions to execute and submit medical release forms 2802 [sic] and 2820, and gave him extensions of time in which to comply with these instructions. It was not unreasonable for Carrier to require Claimant to submit the forms in view of his lengthy absence from work due to medical reasons. Moreover, the requirement that he submit the forms conformed to Carrier's longstanding practice. Claimant refused to return the completed forms, however, even after repeated requests from the Carrier to do so. Claimant's uncooperative attitude was further demonstrated by his refusal to testify at the Investigative Hearing.

We find no basis in the record upon which to relieve Claimant of his obligation to file the medical release forms required by the Carrier. We further find that the discipline assessed Claimant was not arbitrary, capricious or excessive in light of his disciplinary history and his persistent refusal to provide the medical information requested by the Carrier.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 5th day of November 1997.